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No. 844

In the Supreme Court of the United States

OCTOBER TERM, 1964

FLOYD B. HARMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 536–543; Pet. App. 15–23) is reported at 339 F. 2d 354.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1964 (R. 535; Pet. App. 24), and the petition for a writ of certiorari was filed on January 18, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an official of a labor organization, who uses credit cards belonging to that organization to charge personal expenses and pays these bills through

checks of the organization signed by him, has committed embezzlement and conversion of union funds in violation of 29 U.S.C. 501(c).

2. Whether petitioner's conviction should be reversed because the government called in rebuttal three witnesses whom it had reason to believe might claim the privilege against self-incrimination and who in fact did so.

STATUTE INVOLVED

Section 209(c) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 529, 29 U.S.C. 439(c), provides:

> Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this title shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 536, 29 U.S.C. 501(c), provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT

A 24-count indictment returned in the United States District Court for the Eastern District of Michigan charged petitioner with willful embezzlement and con-

version to his own use of funds belonging to Local 614 of the International Brotherhood of Teamsters and with having willfully caused false entries relating to those funds to be made in the books and records of Local 614, in violation of 29 U.S.C. 501(c) and 439(c), respectively (R. 1–14). After a trial by jury, petitioner was found guilty as charged (R. 528–529). On July 31, 1963, he was given a general sentence of probation for two years and, on an embezzlement and conversion count, ordered to pay a fine of $1,500 (see R. 533). The court of appeals unanimously affirmed (R. 535, 536–543; Pet. App. 15–23, 24).

The pertinent facts may be summarized as follows:

1. During the relevant periods, petitioner was the Secretary-Treasury of Local 614 which had offices in Pontiac, Michigan (R. 60–62, 110). Petitioner was in charge of the Local and signed all of its checks (R. 62–63, 71, 110, 124; see R. 76–83). With but a few exceptions, petitioner approved for payment all invoices submitted to Local 614 (R. 62–63, 67, 72, 111–113, 124; see R. 71–83).[1]

From 1959 to 1961, petitioner possessed a thirty-foot cabin cruiser which he used on the waters of the greater Detroit area (R. 27, 54, 56). Local 614 did not own a boat at that time (R. 96). During this period, petitioner obtained from various waterside marinas boat gasoline, boating equipment (*i.e.*, boat "bumpers," helmsmen seats and a bilge pump) and general store items which he had charged to oil com-

[1] The office manager did not need petitioner's prior approval to write out checks in payment of wages or utility charges (R. 124).

pany credit cards made out to Local 614 (R. 32–35, 36–43, 54–55; see R. 58). On these occasions, petitioner was accompanied on board the boat by various people, including his family (R. 35, 50, 54, 57, 58–59).

In mid-1960, petitioner applied for and obtained a Mobil Oil Company credit card which was made out in the name of Local 614 (R. 28–29). Petitioner subsequently gave this credit card to the proprietor of a waterside marina with instructions not to use it "for small amounts" but to "keep it between $25.00 and $30.00" (R. 30, 31, 44, 49). Only petitioner had access to this credit card (R. 95). Petitioner signed a number of blank credit slips which he left with the proprietor of the marina (R. 30, 43–44). In a "roundabout way," petitioner told the proprietor not to tell his employees about the arrangement (R. 32).

At regular intervals during 1959 to 1961, the oil companies which had issued credit cards to Local 614 submitted invoices to the Local for the amount of the credit purchases. A portion of the invoices submitted by three oil companies included charges incurred by petitioner on his boat;[2] the invoices from the Mobil Oil Company related only to the boat charges (R. 36–43, 71–85). After petitioner approved the payment, these invoices were paid by checks from Local 614 which he signed (R. 71–85, 112–113, 127). The payments were entered in the Local's cash disbursements journal as "car and transportation" expenses (R. 84–85, 94–95). The check stubs reflected

[2] Other business agents of Local 614 were authorized to use credit cards on the purchase of gasoline, oil, etc., for automobiles used for business purposes (R. 64, 65, 118).

that the payments were made for automobile expenses (R. 71–83).

On January 2, 1962, petitioner gave to an employee of Local 614 personal checks signed by him for $1,100.00 and $415.67 with the Local as payee (R. 102–103). When subsequently asked by the bookkeeper as to the purpose of the checks, petitioner replied that he would have to talk to the accountants about it (R. 104). On January 3, 1962, investigators from the Bureau of Management Reports of the Labor Department entered the Local's offices and commenced to examine its books and records (R. 107–108, 129). In May 1962, petitioner told the Local's bookkeeper that he had been told that he should "pay the money back into the union," and that these payments were for the "Mobil gas card" (R. 106, 125).

2. At the trial, the defense called as witnesses the president of another Local, several shop stewards belonging to Local 614, two attorneys, and several parties connected with the management of small businesses. These witnesses testified that between 1959 and 1961 they and petitioner took boating cruises on petitioner's boat, and that on such trips they and petitioner discussed such things as employee grievances, jurisdictional disputes, union organizational activities, problems with which Local 614 was confronted, and the like (R. 172–174, 178–179, 181–182, 189–192, 194–195, 197, 202–203, 206, 210–212, 218–219, 221, 224–226, 252–254, 256–259, 267, 270, 272). Generally speaking, these witnesses had known petitioner for a number of years (*e.g.*, R. 198, 205). Three of them testified that while on these boating trips they

either discussed union business and fished or simply fished (R. 187–188, 192–193, 197); another testified that his 30 to 40 boat trips with petitioner were for business and social reasons (R. 270, 272). The wives of petitioner and others were sometimes present on various boat trips (R. 211–212, 281, 287). Petitioner did not testify.

3. In rebuttal, the government called a number of witnesses. Six witnesses testified that they were either stewards or were otherwise officially connected with Local 614 during the periods in question, and that they never discussed union business on petitioner's boat (R. 320–322, 343–344, 357–358, 359–360, 361–362, 368–369). Two of these witnesses testified that to their knowledge other union stewards had not been invited onto petitioner's boat to discuss grievances (R. 322, 344–345). Two others testified that they did not know whether other stewards had been on the boat to discuss business with petitioner (R. 358, 362).

The government also called as witnesses four additional officials of Local 614. After answering a few questions on direct examination, three of them (a vice-president, a business agent, and an organizer) invoked the privilege against self-incrimination when asked questions pertaining to their duties with the Local. They also invoked the privilege when asked whether petitioner's boat had been used for the conduct of union business. One witness also did so when asked whether he knew the petitioner; and another when asked whether petitioner had refused to turn over certain receipts (R. 302, 315, 318–319, 340–341,

342, 346–349). The fourth witness who invoked the privilege, the president of Local 614, was examined outside the presence of the jury because government counsel informed the court that he had information that the witness would, besides invoking the privilege against self-incrimination, state that he was under indictment (R. 349–355).

After the first of these witnesses invoked the privilege, the court excused the jury and counsel for petitioner moved for a mistrial (R. 302–303). During the colloquies which followed, government counsel explained his position as follows (R. 304, 306–307):

> Mr. COLEMAN [government counsel]:
>
> What is the position of the Government here? The Government has a duty here. The Government has a duty to society. There are certain people involved that know something about this matter. Is it the election of the defendant to pick and choose and say I am going to bring in a half a dozen people here that are going to tell the story I want the jury to hear?
>
> What about these other people that know something about it? Doesn't the Government have the right, doesn't the Government have a duty to bring these people before the jury to get the truth? Isn't a trial to get the truth? We put these people on the stand. If we didn't put these people on the stand, what would the jury think? Why didn't the Government call them? They have the power of subpoena. Why didn't they bring them in here? The Government has a duty and a right to do it. If the Government did not do it, it would hurt the Government's case.

The case law on this is clear, it says there has to be overwhelming reasons for the witness to take the Fifth Amendment. It has to be asserted to each and every question. It can't be a blanket refusal before they take the stand.

* * * * *

Certain witnesses were questioned last Friday, and they did give answers. We were informed by counsel that they were going to take the Fifth Amendment today. We called them in. We talked to them. They said they would take the Fifth Amendment. Then we stressed to them certain duties and obligations of these witnesses. Certain things they should search their own minds and consciences for. Then we left them to do that searching of the conscience.

The COURT. You have not talked to them since?

Mr. COLEMAN. We have not talked to them since.

May I add one thing, your Honor? May I add this, no matter what went on then, it is case law position that the Government, no matter how much a witness may say beforehand that he will take the Fifth Amendment, that you never really know the witness is going to take the Fifth Amendment until he is up on the witness stand, until he has the oath administered to him to tell the truth before the Judge and jury and the question is put to him. That is case law.

After further argument, the court ruled (R. 311):

In the first place, in view of what is before me, I cannot find that the Government knew what action this witness would take at the time he was called to the stand.

> Certain representations, I am told, had been made to him and had been left unanswered.
>
> In addition, I think the cases are clear that the Fifth Amendment cannot be asserted in advance of questions actually propounded.
>
> If the law were otherwise, it would preclude a Court's examination into the reasonableness of the grounds asserted.
>
> I also point out to you that in certain of the cases to which reference has been made, the questions propounded touched the vital elements of the charge, and there might have been some grounds—I say might have been some grounds—for the jury's inferring that certain answers might be made. That was not the case here. These were preparatory questions, so in view of these facts, the motion for mistrial will be denied.

Shortly thereafter, the jury was recalled. When the witness re-invoked the privilege, the court told the jury (R. 316):

> The fact that a witness, called by the Government, refuses to answer certain questions directed to him, which may have some bearing on the case, should not be construed against the defendant in any way, since the witness, by so refusing to answer, merely stands upon his constitutional right not to subject himself by self-incrimination to a possible criminal prosecution.

This instruction was repeated later in the trial as to the other two witnesses who invoked the privilege before the jury (R. 341–342, 346–347). Defense counsel requested the court not to repeat this instruction in the court's final charge to the jury (R. 439).

On cross-examination, the three witnesses who invoked the privilege before the jury testified that they had informed government counsel either the day they were called as witnesses or a few days earlier that they would invoke the privilege against self-incrimination if called to testify at the trial (R. 318, 341, 348). On redirect examination, the witnesses invoked the privilege when asked whether on the Friday before the trial commenced they had told the prosecutor that they knew nothing about petitioner's boat (R. 318–319, 342, 349). One of the three witnesses, who had said on cross-examination that he had invoked the Fifth Amendment before the grand jury, testified on redirect that he did answer some questions before the grand jury but that "after a lot of consideration I think I was wrong in a lot of things I answered" (R. 318).

ARGUMENT

1. Petitioner contends (Pet. 2, 11–12) that his unauthorized use of the Local's credit cards did not constitute embezzlement under 29 U.S.C. 501(c). He reasons that embezzlement requires that the employee receive the funds he later embezzles from his employer, while here the funds were received by third parties and the petitioner never had them at any time.[3]

Petitioner's contention is erroneous for three reasons. First, Section 501(c) does not prohibit merely

[3] If petitioner were correct on this contention, the sentence of two years' probation would still stand since it was a general sentence on both the 12 counts charging embezzlement and conversion and the 12 counts charging falsification of the Local's books. However, the fine of $1,500 on count one would be invalid.

the embezzlement of union funds. Instead, it provides that "[a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use * * * any of the moneys, funds, securities, property or other assets of a labor organization" is guilty of a felony. Consistent with this Section, the indictment charged that petitioner "did unlawfully and willfully embezzle *and convert to his own use*" various sums of money belonging to the Local (emphasis added) (R. 2–6). Conversion, of course, is much broader than common-law embezzlement. As this Court pointed out in *Morissette* v. *United States,* 342 U.S. 246, 271–272:

> Conversion * * * may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of * * * property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining.

After instructing the jury on the elements of the offense of embezzlement, the trial court charged that conversion to one's own use "means that one applies,

appropriates, uses or sells the goods or other property of another for one's own benefit or profit" (R. 517). Petitioner does not challenge that instruction. Since the record shows that petitioner, without authorization, used the Local's credit cards, knowing that such use would result in payment by the Local of petitioner's personal boating expenses, the jury's finding that petitioner used the Union's funds for his own personal benefit was amply supported by the evidence.

Second, even if the government were required to prove embezzlement in this case, Section 501(c) does not adopt the technical common-law definitions of that crime upon which petitioner relies. Congress clearly intended that Section 501(c) be interpreted and applied broadly in order to secure the highest degree of fiduciary responsibility on the part of representatives of labor organizations who occupy positions of trust. Section 501(a) expressly states:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder * * *.

See also H. Rep. No. 741, 86th Cong., 1st Sess., pp. 9, 44-45; S. Rep. No. 187, 86th Cong., 1st Sess., pp. 12, 42. As the court below observed (Pet. App. 18),

"it would appear that technical common-law distinctions of various types of crimes were not intended to be rigidly applied." Cf. *Hayes* v. *United States,* 329 F. 2d 209, 220–221 (C.A. 8), certiorari denied, *sub nom. Bennett* v. *United States,* 377 U.S. 980; *United States* v. *Harrelson,* 223 F. Supp. 869, 870 (E.D. Mich.).

Finally, even if the government were required to prove common-law embezzlement, the evidence sufficiently shows that the petitioner's conduct constituted such embezzlement of union funds. As shown by the Statement above, petitioner approved for payment the various invoices submitted to the Local and actually signed its checks. Thus, petitioner himself paid the union's funds to satisfy his own debts. In these circumstances, there can be no doubt that petitioner lawfully came into possession of the funds and disposed of them for his own use.

2. Petitioner contends (Pet. 5–11) that his conviction should be reversed because the government called three witnesses to the stand knowing that they would claim the privilege against self-incrimination. However, this contention is controlled by the Court's decision in *Namet* v. *United States,* 373 U.S. 179. There, the government during its case-in-chief called two witnesses who had previously pleaded guilty to charges similar to those on which the defendant was subsequently convicted. These witnesses interposed the privilege against self-incrimination as to questions seeking to elicit information concerning their relationship with the defendant, and the privilege was upheld. The prosecutor had previously been advised by defense counsel that the witnesses, if called, would

invoke the privilege against self-incrimination. In affirming the conviction, the Court stated that the prosecutor was not guilty of misconduct because the non-privileged information possessed by the witnesses had substantial value to the government's case. The Court then held that it could not find that "the few invocations of privilege by the [two witnesses] were of such significance in the trial that they constituted reversible error even in the absence of prosecutorial misconduct" in view of the other evidence before the jury. *Id.* at 189.

a. Similarly, there was no misconduct on the part of the prosecutor in calling and examining the three officials of Local 614 who invoked their privilege against self-incrimination before the jury. As shown by the Statement, one of these witnesses had testified to certain matters before the grand jury, and all of them had been interviewed five days before the trial commenced and "did give answers" (R. 306). While it is true that the prosecutor was subsequently advised by defense counsel and the various witnesses that, if called to testify, the privilege against self-incrimination would be asserted, he was under no duty to accept at face value such advance assertions and decline to call and question the witnesses at the trial. See *Namet* v. *United States, supra,* 373 U.S. at 188.

The prosecutor "stressed to [the witnesses] certain duties and obligations" and left them to "search their own minds and consciences" about testifying (R. 306–307). At the trial the few questions asked these witnesses related to their duties with the union, the

use of petitioner's boat, whether one witness knew petitioner, and whether petitioner had refused to turn over certain receipts. Since these are not questions obviously and closely involving the possibility of incrimination, the prosecutor could reasonably hope that the witnesses, upon reflection concerning their obligation as citizens, would answer them.

Moreover, there was good reason for the government to call the three witnesses. As shown by the Statement, a number of shop stewards and other witnesses testified for petitioner in an effort to show that his boat was used in the conduct of union business. Since petitioner did not call any of the officials of Local 614 to testify on this point—parties who would have been in a position to describe the union's practices, if any, in relation to petitioner's boat—the government had the right to call those officials most likely to have knowledge on that subject. To be sure, the government did call and elicit testimony from shop stewards connected with Local 614 during the periods in question and some former officials of the Local. However, their testimony was not as authoritative as that of the witnesses in question—a vice-president, an organizer, and a business agent—all of whom had previously co-operated to some extent with the government.

b. Again as in *Namet,* the invocations of the privilege were not so significant in petitioner's trial as to justify overturning his conviction in the absence of misconduct by the prosecutor. Most of the questions which the witnesses refused to answer were prelimi-

nary. While the questions whether petitioner's boat was used for union business related to petitioner's defense, they did not depict the crime itself. More importantly, the trial lasted seven days, and some 26 witnesses were called. As the court below noted, the government's case was supported by "strong, corroborated evidence" (Pet. App. 22).

In addition, unlike in *Namet* where no instruction was asked or given (373 U.S. at 190), the court here promptly cautioned the jury that they were not "in any way" to construe against petitioner the refusal by government witnesses to answer questions propounded to them since the witnesses merely stood upon their constitutional right against self-incrimination (R. 316). This admonition was repeated later in the trial (R. 341–342, 346–347). In its final charge to the jury, the court, at petitioner's request, did not again give this instruction. However, it did charge that the government bore the burden of proving each of the essential elements of the crimes charged and of establishing guilt beyond a reasonable doubt; that a defendant was "not to be convicted on mere suspicion or conjecture"; that the jury was to base its verdict upon the evidence and "the law as stated by the Court"; and that the evidence in the case consisted of the "sworn testimony of the witnesses, all exhibits which [had] been received in evidence, all facts which [had] been admitted or stipulated, and all applicable presumptions stated in [the] instructions" (R. 512–513, 516, 519–521, 524). The jury must be presumed to have followed these instructions. *Delli Paoli* v.

United States, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.[4]

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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[4] The decision below does not conflict with *Fletcher* v. *United States*, 332 F. 2d 724 (C.A. D.C.), as petitioner asserts (Pet. 5-6, 10). In that case, unlike here, the record showed that the prosecutor and the court "knew" that the witness would invoke the privilege against self-incrimination to various questions propounded; that the questions "depicted the alleged offense in its entirety"; that the trial lasted for only about six hours and the witness' "part in it was a major feature of the proceeding"; and that the court's cautionary instructions were unclear since the jury might have understood a particular statement "to mean that [the witness'] refusals might be considered along with other evidence as proof of Fletcher's guilt." *Id.* at 726-727.

Petitioner also relies (Pet. 9-10) on several cases in arguing that a cautionary instruction is not sufficient. However, these cases all preceded *Namet*, with the exception of *Fletcher*. In the latter case, the court expressly stated that it was not considering the situation where a "forceful instruction to the jury" was given. 332 F. 2d at 727. The other cases cited by petitioner hold, at most, only that an instruction is not sufficient where the prosecutor has committed misconduct by calling the witnesses to the stand. Here, as we have seen, no such misconduct was committed under the principles laid down by this Court in *Namet*.

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